Supreme Court U.S.
FILED
DEC 13 2002
OFFICE OF THE CLERK

No. 02-577

In The
Supreme Court of the United States

MARIA CANO, ET AL.,

Appellants,

v.

GRAY DAVIS, ET AL.,

Appellees.

On Appeal From The United States District Court For The Central District Of California

APPELLANTS' OPPOSITION TO MOTION TO AFFIRM OR DISMISS

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ARGUMENT

By describing at length Latino electoral success in California, the participation of Latino officeholders in the redistricting process, and the district court's determinations regarding dilutive "effects" as defined in *Thornburg v. Gingles*, 478 U.S. 30 (1986) Senate Appellees' Motion to Affirm or Dismiss overly complicates and obscures what is a straightforward issue raised in this appeal: is intentionally limiting the electoral power of a racial group legally proscribed even when the targeted group maintains substantial political power, which it achieved in part through candidates successfully appealing to members of other racial groups? Or, stated differently and in a more reduced fashion, does a racial group's power and cross-group appeal ever render intentional discrimination against the group permissible? Informed by this Court's longstanding and more recent precedent, the answer seems plain. Intentional, race-based harm to a group is never permissible under our laws.

Plaintiffs produced evidence of intent that showed far more than mere consciousness of race on the part of the map drawers. Indeed, while Senate appellees introduced testimony and argument that attempted to place a more benign countenance on the California legislature's racial intent,[1] plaintiffs presented substantial direct and circumstantial evidence of more insidious motive. At the

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[1] Of course, even if true, the purported benevolent splitting of the Latino community to ensure that both Democratic incumbent Congress members (each now conveniently unthreatened by any bloc of Latino Democratic voters who might unite behind a primary challenger) would learn to serve Latinos cannot excuse prohibited racial intent. *See* Juris. Statement at 10-11 & n. 7.

summary judgment stage, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Applying that standard here, the evidence showed that, in drawing the congressional districts in question, defendants split the Latino community and restricted its voting strength because they viewed that community as a political monolith whose continued unification – the Latino neighborhoods involved had been united in the same district over the previous decade – would threaten even three quite-popular Democratic incumbents with potentially successful nomination challenge.[2] In other words, defendants sought to protect incumbents from challenge not by a particular person or political party, but by *anyone* who came from and had the support of the *Latino* community. That is the quintessence of intentional racial vote dilution.

Yet, while the district court formally applied the proper summary judgment standard – assuming that plaintiffs could prove intentional dilution – it nonetheless held that such a quintessentially dilutive motive was acceptable and lawful because California Latino candidates have historically garnered some white votes and, in part because of that crossover appeal, have attained

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[2] Plaintiffs' evidence showed that defendants adopted something very much like Dr. Morgan Kousser's "40% rule," which Senate appellees now characterize as odd and unprecedented. *See* Mot. to Affirm at 6. While they might not have catalogued empirical evidence as Dr. Kousser did, the state's map drawers acted on their conclusion, informed by experience, that Latino voting strength above a certain level in the Democratic Party would threaten incumbents because Latinos could control the outcome of the primary election.

significant, albeit far from controlling, political power. In essence, the district court concluded that the very palpable "effect" that the map drawers themselves perceived – that the Latino community's ability to elect a candidate of choice through a primary challenge would be diminished if the community were split – and that Senate appellees now admit to be "impeccable as a matter of logic," Mot. to Affirm at 23,[3] is insufficient to permit a challenge to intentional dilution. In virtually any other context, this impeccably logical (and very real) effect would suffice to open a wrong – such as intentional racial vote dilution – to court challenge, yet the district court held that effect insufficient in the voting rights context. Instead, the court applied a much higher "effect" standard, one of no cross-over voting and near total exclusion from political power.

Thus, this appeal squarely presents a puzzle that this Court alone can solve – whether voting rights, unique among all other areas, is an area where federal constitutional and statutory law permits even the most malicious and self-serving racial discrimination so long as the target has attained some amount of political power. The fair extension of this Court's jurisprudence seems to suggest strongly that voting, a right so foundational and so preservative of all others, is not such a free zone for racial animus, yet three seasoned federal judges and the largest state in the union believe that it is. Dismissal or summary affirmance are not appropriate with such a substantial question at stake.

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[3] Senate appellees' acknowledgment of this effect exposes their characterization of plaintiffs' claim as one of "intent with no effects," *see* Mot. to Affirm at 23, as so much rhetorical hyperbole.

I. Intentional Vote Dilution Claims Need Not Satisfy Any Heightened Standard of "Effects."

Plaintiffs who can prove intent, under standards initially set forth in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), must show an effect of the intentional discrimination; however, that effect need not rise to the "effects" showing required to prove a violation in the absence of evidence of intent. As a matter of logic, when a plaintiff cannot demonstrate intent through direct and strong circumstantial evidence, but proceeds to show only effects as leading to an inference of intent, the level of "effects" required should necessarily be higher. Otherwise, intent evidence becomes utterly superfluous, a result wholly incongruous with the constitutional imperative of rooting out *intentional* discrimination.

Contrary to Senate appellees' assertion, none of this Court's precedent establishes any rule contrary to this logic. Indeed, the racial discrimination precedents appellees cite, *see* Mot. to Affirm at 21, are consistent with this logical principle. Two of these cases, *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *White v. Regester*, 412 U.S. 755 (1973), were decided before this Court held, in *Washington v. Davis*, 426 U.S. 229 (1976), that the constitution requires proof of intentional discrimination, so the two cases necessarily involved a heightened requirement of "effects" – to demonstrate not merely standing to seek a court remedy, but a constitutional violation as well.[4] In *City of*

[4] Indeed, in *Whitcomb*, this Court noted that there was "no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial . . . discrimination." 403 U.S. at 149.

Mobile v. Bolden, 446 U.S. 55 (1980), also cited by appellees, this Court concluded that the Voting Rights Act required proof of intent; there was no decision that plaintiffs must also meet some heightened "effects" standard when they present substantial direct and circumstantial evidence of intent. Indeed, the Court compared the required showing of intent to that required in *Washington v. Davis* and *Arlington Heights*. *See* 446 U.S. at 66-67. Finally, in *Rogers v. Lodge*, 458 U.S. 613 (1982), the discussion of effects cited by appellees also arises in the context of an attempt to prove intent in the absence of direct evidence of it. *See id.* at 624 (reliance on effects and "supporting proof" to "support an inference of intentional discrimination."). Thus, none of these cases involves direct and substantial proof of an intent to dilute minority voting power.

That, then, leaves appellees in near-exclusive reliance on one stray statement in *Davis v. Bandemer*, 478 U.S. 109 (1986), a case involving political gerrymandering and not racial gerrymandering. This reliance belies a failure to appreciate the constitutionally unique status of intentional *racial* discrimination. Unlike race or ethnicity, political affiliation is not a suspect classification subject to strict scrutiny. Indeed, in *Davis* itself, the court acknowledged this difference in noting that the political gerrymandering plaintiffs faced a more difficult burden: "the elements necessary to a successful vote dilution claim may be more difficult to prove in relation to a claim by a political group." *See id.* at 131 n. 12.

Intentional racial discrimination must be accompanied by some real effect to be actionable, but that showing of effect need not rise to showing of near total exclusion

from the political process. Nothing in this Court's precedent dictates such a difficult standard.

II. Voting Rights Is Not a Constitutional Outlier in the Area of Racial Discrimination.

Senate appellees fault plaintiffs for discussing racial discrimination precedent from outside the redistricting context. *See* Mot. to Affirm at 24. Based on this critique, appellees simply ignore what these cases from other contexts say and mean. This extraordinary attempt at hyper-atomized analysis implies an otherwise coherent constitutional vision as to intentional racial discrimination, with the singular exception of redistricting. Even if such exceptionalism had a place in constitutional interpretation, it would be bizarre to apply a more lenient stance toward intentional discrimination in the area of voting rights. The primacy of these rights, so preservative of all other rights in our democratic system, is well-established.

Yet, that is precisely the kind of exception the district court endorsed in its decision and appellees urge in their motion. The Court's more recent and historical discussions of the extreme constitutional disfavor of intentional discrimination, even when such discrimination targets the majority group with controlling political power, reflect a doctrine directly at odds with the lower court judgment here, that intentional discrimination was lawful because Latinos have gained significant political power – perhaps even rising to proportional, depending on what subset of the total population serves as denominator – in California. *See generally* Juris. Statement at 17-23.

If the Constitution and federal civil rights laws intend that intentional racial discrimination in the area of voting rights be treated differently,[5] this Court should explain the contours of that exceptionalism to guide future decision-makers. If that is not the meaning of our law, then the district court decision must be reversed. In either event, this is not a case where summary affirmance would serve its appropriate purpose.

III. The Constitutional Wrong of Racial Classification of Voters Can Appear in Dispersion As Well As Segregation.

Senate appellees essentially re-assert the district court's conclusion that plaintiffs cannot pursue a claim under *Shaw v. Reno*, 509 U.S. 630 (1993), because plaintiffs object to the "cracking" of a minority community rather than to the "packing" of it. It is true that, to date, the cases decided by this Court under the *Shaw* doctrine have involved "packed" districts in which one racial group predominates, and it is the intentional concentration of a group of voters that plaintiffs in these cases have challenged. However, this Court has identified the underlying constitutional wrong as the classification of voters on the basis of race. *See, e.g., id.* at 657 ("Racial classifications with respect to voting carry particular dangers."); *Miller v.*

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[5] Of course, it is true that, in recognition of the need to take into account communities of interest, *awareness* of race is permitted greater scope in redistricting than in other areas; however, as plaintiffs explain in the Jurisdictional Statement and above, here the evidence was of actual intent to dilute a racial group's power rather than simple race-consciousness.

Johnson, 515 U.S. 900, 911-12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race," think and vote alike.). This wrong can occur when voters of a particular group are separated between districts just as much as when they are concentrated in a district.[6]

Thus, this Court's expressed disfavor for the racial classification of voters can apply regardless of whether a district is racially segregated or not. Segregation per se is not a constitutional wrong; it is racial classification, coupled with predominant reliance on that classification in crafting districts, that offends the Constitution. While this often appears in the form of racially segregated districts, it can also occur, as here, when a racial group is split, having been united for the previous ten years, and the predominant concern in making the split is race. Summarily affirming the district court decision here will send the incorrect message that it is segregation alone that is the constitutional wrong.

IV. Predominant Reliance on Separation of Racial Group Deviates Per Se From Traditional Criteria.

In arguing that there was no evidence that the state failed to follow traditional redistricting criteria, Senate appellees, like the district court, ignore the evidence of

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[6] Indeed, "packing" and "cracking" are often mirror images; concentrating one group often means splitting another group between districts.

intentional racial discrimination, which the court was obliged to credit at summary judgment. Intentional "cracking" of a racial group is not a traditional redistricting criterion; thus, such "cracking" is of course a departure from acceptable tradition. And, while this Court has identified departures from traditional criteria as tending to prove intentional racial classification of voters, that does not mean that intentional classification must involve abandonment of such criteria as contiguity, equipopulousness, or minimal city splits.[7] *See* J.S. App. at 20-22 (district court discussion of traditional criteria). Even if lots of smoke usually indicates fire, that does not mean that every fire has lots of smoke. Sometimes fire can be detected by heat or simply by observing the flames.

Here, trenchant evidence of intentional discrimination demonstrated unlawful classification of voters on the basis of race.[8] No demonstration of contiguity, a now ubiquitous characteristic of districts in the modern age; equal-sized districts, a separate and basic constitutional mandate; or fewer city splits, a tepid indicator of traditional redistricting practice, could possibly overcome this evidence. Like the proverbial silk purse from a sow's ear, adherence to these criteria – wholly unremarkable when present, even if extraordinary when absent – cannot convert intentional

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[7] It seems incongruous to rely on minimal city splits as evidence of adherence to traditional criteria, *see* Mot. to Affirm at 19, when the congressional districts involved in this appeal lie within two large cities, Los Angeles and San Diego, which must be split in order to satisfy the constitutional one-person, one-vote standard.

[8] Plainly, in order to discriminate on the basis of race, one must first classify and distinguish on that basis.

racial discrimination itself into what it is not, an ordinary and acceptable characteristic of district-drawing.

CONCLUSION

The district court properly assumed based on strong evidence – as it was required to do at summary judgment – that plaintiffs could demonstrate an intent to dilute the Latino vote. Yet, despite this conclusion, the court held that plaintiffs could not prevail under either a vote dilution or *Shaw* theory. This conclusion immunizes intentional racial discrimination despite an anticipated and real effect on the rights of Latino voters. Such an immunity is unprecedented. Summary affirmance or dismissal of the appeal is inappropriate.

Respectfully submitted,

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